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No.

In the Supreme Court of the United States

October Term, 1983

THE STATE OF OHIO,
Petitioner,

vs.

KENNETH M. JOHNSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the double jeopardy protections of the United States Constitution prohibit the continued prosecution of a defendant charged in a single, multiple count indictment of arguably greater and lesser included offenses, where the defendant persuades the trial court prior to trial, to accept his guilty pleas to the lesser counts of the indictment, where the state criminal code provides for crediting time served, concurrent sentencing and vacation of earlier judgments of conviction.

II. Whether the double jeopardy clause of the United States Constitution prohibits the continued prosecution of a criminal defendant, charged in a single, multiple count indictment containing greater and lesser included offenses, where that defendant persuades the trial court to honor his election to plead guilty to the lesser offenses over the state's objections.

III. Whether murder as defined in Ohio Revised Code Section 2903.02 and Involuntary Manslaughter as defined in Ohio Revised Code Section 2903.04 are the same offenses for purposes of the double jeopardy provision precluding multiple punishments for both those offenses.

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No.

In the Supreme Court of the United States

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THE STATE OF OHIO,
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vs.

KENNETH M. JOHNSON,
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PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

To: *The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

OPINIONS OF THE COURT BELOW

The Official Report of the Opinion by the Supreme Court of Ohio affirming the judgment of the Ohio Court of Appeals for the Eleventh District. Appendix at p. A1.

The Judgment Entry and Opinion of the Ohio Court of Appeals for the Eleventh District affirming the judgment of the Court of Common Pleas, Lake County, Ohio. Appendix at p. A14.

The Judgment Entry and Opinion of the Court of Common Pleas, Lake County, Ohio, granting the Defendant's Motion to Dismiss the charges of Murder and Aggravated Robbery. Appendix at p. A21.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on August 31, 1983. No Motion for Rehearing was filed. The jurisdiction of this Court is invoked under Title 28, United States Code Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVED

The relevant constitutional and statutory provisions involved herein are set forth in Appendix at p. A26.

(5th Amendment)

(14th Amendment)

Ohio Revised Code, Section 2903.02(A)(B) Murder

Ohio Revised Code, Section 2903.04(B)(C) Involuntary Manslaughter

Ohio Revised Code, Section 2911.01(A)(B) Aggravated Robbery

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Ohio Revised Code, Section 2967.191 Reduction of Minimum and Maximum Sentence

STATEMENT OF THE CASE

In the early morning hours of January 25th, 1983, one Thomas Hill was shot to death at his apartment in the City of Mentor-on-the-Lake, Lake County, Ohio. At the time of the killing of Thomas Hill several items of his personal property were stolen from his apartment.

The Defendant-Respondent and two Co-Defendants were arrested in connection with the slaying less than twelve hours later. A preliminary hearing was held within five days of those arrests in the Mentor Municipal Court, and due to a City Prosecutor's error, all charges were dismissed against the Defendant-Respondent and his bond was released.

On February 13, 1979, the Lake County Grand Jury found probable cause existed to believe that the Defendant-Respondent had violated four separate criminal statutes and returned a single Secret Indictment charging the Defendant-Respondent with one count of Murder in violation of Ohio Revised Code Section 2903.02(A), one count of Involuntary Manslaughter in violation of Ohio Revised Code Section 2903.04(B), one count of Aggravated Robbery in violation of Ohio Revised Code Section 2911.01(A)(1), and one count of Grand Theft in violation of Ohio Revised Code Section 2913.02(A)(1), in Case No. 79-CR-048.

Prior to the action of the Grand Jury the Defendant-Respondent absented himself from the jurisdiction of Lake County and it was not until nearly two years after Thomas Hill's death that he was arrested in the State of Tennessee. Upon his apprehension and return to Ohio, the Defendant-Respondent was brought before a Lake County Common Pleas Judge for purposes of arraignment on October 9,

1980. At that hearing the Defendant-Respondent proffered "Guilty" pleas to the charges of Involuntary Manslaughter and Grand Theft and "Not Guilty" pleas to the charges of Murder and Aggravated Robbery. The State of Ohio objected to the proffer of the guilty pleas and the arraigning judge reserved ruling on whether or not he was obligated to accept the pleas. Bond was set in the matter and the case was subsequently assigned to the trial court. The trial court was faced with the issue of whether or not it should accept the proffered guilty pleas to the lesser offenses.

Following written arguments by both sides and over the vehement objections of the State of Ohio, the Defendant-Respondent, at a hearing on November 26, 1980, persuaded the trial court to exercise its discretion in favor of accepting his guilty pleas to the lesser indicted offenses of Involuntary Manslaughter and Grand Theft. The Court then sentenced Defendant-Respondent to three to ten years on the Involuntary Manslaughter count and two to five years on the Grand Theft count with those sentences to run consecutively.

Following those pleas the Defendant-Respondent moved to dismiss the remaining counts of Murder and Grand Theft on Double Jeopardy grounds arguing continued prosecution amounted to multiple prosecutions for the same offense and invoking the doctrine of collateral estoppel. The trial court granted the Motion to Dismiss following briefs and arguments in its Judgment Entry and Opinion of March 31, 1981 (See Appendix at p. A21).

Thereupon the State of Ohio filed an appeal of the trial court's dismissal of the remaining counts with the Court of Appeals of Ohio, Eleventh District, Lake County, Case No. 8-221. The State Court of Appeals, in its Judg-

ment Entry and Opinion of April 1, 1982, affirmed the trial court's dismissal of the counts in the indictment charging Murder and Aggravated Robbery (See Appendix at p. A14).

The Supreme Court of Ohio affirmed the decisions of the Court of Appeals on August 31, 1983, in Case No. 82-657, and found that Aggravated Robbery and Grand Theft were allied offenses of similar import pursuant to Ohio Revised Code Section 2941.25(A) and that since Murder and Involuntary Manslaughter share the common element of causing the death of another and are distinguishable only by the defendant's mental state, the defendant, in any single killing could only be convicted of one offense or the other but not both. In so finding the Court held that in this case the Double Jeopardy provision prohibiting multiple punishments for the same offense would be violated by further prosecution of the Defendant-Respondent (See Appendix at p. A1).

ARGUMENTS RELIED UPON FOR ALLOWANCE OF WRIT

I. The double jeopardy protections of the United States Constitution do not prohibit the continued prosecution of a defendant charged in a single, multiple count indictment of arguably greater and lesser included offenses, where that defendant persuades the trial court to accept his guilty pleas to the lesser counts of the indictment, where the state criminal code provides for crediting time served, concurrent sentencing and vacation of earlier judgments of conviction.

The issues presented in this case involve substantial constitutional questions as well as being of great general and public importance.

The State of Ohio has a legitimate interest in seeing that any and all issues involving criminal conduct are resolved in one proceeding and that criminal conduct is fully punished. This is particularly the case where a Grand Jury has determined that probable cause exists to believe that the conduct of a defendant has resulted in the violation of several statutes and those violations have been presented for consideration in a single indictment.

The issues presented in the case at bar have a significance to American jurisprudence far beyond the individual rights of this Defendant-Respondent. Especially since, as will be argued later, the Defendant-Respondent has had no constitutionally guaranteed rights violated by the State of Ohio. But rather, the Defendant-Respondent has, through an errant trial court's abuse of discretion, been allowed to plead guilty to the crimes of his choice, raise the spector of

the Double Jeopardy Provision, and thereby deprive the people of Ohio their right to have the issues raised in the Indictment litigated and resolved before a court of law.

This is a radical and, indeed, a sinister departure for the Courts of the United States. The hallmark and foundation of the American system of jurisprudence has been its unswerving adherence to the belief that both parties to a legal action should be dealt with equitably, and that both sides should have an equal and fair opportunity to present the facts to a finder of fact, be it Judge or jury. In past criminal cases the people were deprived of that right to present facts only when they had violated some constitutionally or statutorily guaranteed rights of the Defendant. In those cases, the Courts have ruled, the concepts of equity and fairness to both parties has mandated that the State be deprived of the right to proceed, in part or whole, with the factual issues. In other words when certain evidence, whether crucial or peripheral, was suppressed.

In the case at bar, however, the State of Ohio has not violated the Defendant-Respondent's rights in any way. It brought the facts before a Grand Jury which duly, and legally, indicted the Defendant-Respondent for several separate crimes involving the same factual issues. The State of Ohio has, throughout these proceedings, attempted, indeed begged, to be able to present the facts of this case in a single proceeding. It has been the Defendant-Respondent who has made every effort to separate and bifurcate these proceedings. If the Defendant-Respondent is allowed to do this, he will have successfully evaded the just prosecution of his criminal acts, deprived the people of Ohio of their rights and, more importantly, laid the groundwork for future Defendants to similarly thwart justice.

The most frustrating and frightening factor of the Ohio Supreme Court's decision is that it so clearly ignores and contradicts the established case law. It has been long established that people have a right to present the factual issues of their case to a finder of fact. *United States v. Gray*, 448 F.2d 164 (1971); *Singer v. United States*, 380 U.S. 24, 85 S. Ct. 783, 13 L. Ed. 2d 630 (1965). Furthermore, there is abundant case law which establishes that the Defendant does not have a constitutionally guaranteed right to demand that a Court accept his guilty plea. *Alford v. North Carolina*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *Longfellow v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (9th Cir., 1971); *Lynch v. Overholser*, 369 U.S. 705, 82 S. Ct. 1063, 8 L. Ed. 2d 211 (1962); *United States v. Biscoe*, 518 F.2d 95 (1st Cir., 1975); *Bailey v. Rose*, 378 F. Supp. 227 (E.D. Tenn., 1974); *Green v. United States*, 40 App. D.C. 426, 46 LRA, NS, 1117 (C.A., D.C., 1913); *United States v. Willis*, 75 F. Supp. 628 (D.C., D.C., 1948).

This Defendant-Respondent has obviously sought to distort the law in an effort to avoid the prosecution of his crimes. He was allowed to plead guilty over the objections of the people. Following his plea of guilty, he attempted to, and may succeed in, using the Double Jeopardy Provisions of the Sixth Amendment in an unprecedented manner. A manner which protects the Defendant-Respondent but in the process denies the people of their right to a trial.

The Supreme Court for the State of Ohio has determined that where a Defendant persuades a trial court to accept his guilty pleas to lesser indicted offenses, the prohibition against imposing multiple punishments for the same offense, *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), precludes the State

from proceeding any further in trying to have the issues of the Defendant-Respondent's culpability fully resolved by a trier of fact, in one judicial inquiry.

In so holding, the Supreme Court of Ohio has misapplied the holdings of this Court in *Pearce, supra,* and its progeny with regard to what constitutes a violation of the Double Jeopardy prohibition against imposing multiple sentences for the same offenses.

The holding of this Court in *Pearce, supra,* does not bar the State from continuing its single prosecution of the Defendant-Respondent. Assuming arguendo, that the counts of the indictment pleaded to by the Defendant-Respondent are the same offenses as the remaining counts, pursuant to *Blockburger v. United States,* 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), then the trial court would be precluded from further sentencing upon conviction, without giving credit for time served for the lesser offenses pursuant to Ohio Revised Code Section 2967.191. Further, Ohio Revised Code Section 2953.21 would permit the trial court to vacate the judgments of conviction for the lesser offenses thus preventing the Defendant-Respondent from multiple convictions and punishments.

As this Court has held, the constitutional prohibition against imposing multiple punishments does not preclude a continuation of the Defendant-Respondent's criminal proceeding, but only requires that "punishment already exacted be fully 'credited' in imposing sentence upon a new conviction for the same offense." *Pearce, supra,* at 718, 719.

It should also be noted that the multiple punishment provision of the Double Jeopardy Clause prohibits only cumulative or consecutive sentencing for the same offenses and does not preclude sentencing which in the aggregate

does not exceed the maximum allowable for the greater offense where separate sentencing is necessitated by the Defendant's own actions. *Jeffers v. United States*, 432 U.S. 137, 97 S. Ct. 2207, 53 L. Ed. 2d 168 (1977). Thus upon the continuation of the Defendant-Respondent's criminal proceeding to conviction of the greater offenses, the trial court's sentencing to concurrent terms of imprisonment pursuant to Ohio Revised Code Section 2929.41 would be perfectly within any constitutional limitations upon multiple punishments for the same offense.

Thus, it is clear that the Supreme Court of Ohio erred in its application of the prohibition against multiple punishments for the same offenses enunciated in *Pearce, supra,* in the case at bar. The State of Ohio should be permitted to continue its prosecution of the Defendant-Respondent on the charges of Murder, notwithstanding his guilty plea to Involuntary Manslaughter. Further, the State of Ohio should be permitted to continue is prosecution of Defendant-Respondent for Aggravated Robbery even though the Supreme Court of Ohio has held that Grand Theft is an "allied offense of similar import" of Aggravated Robbery pursuant to Ohio Revised Code Section 2941.25. That statute is a statutory embodiment of the federal double jeopardy guarantees; however, the lower court erroneously held that the prohibition against imposing multiple sentences for the same offenses under *Pearce, supra,* precludes continued prosecution on the charge of Aggravated Robbery.

II. The double jeopardy clause of the United States Constitution does not prohibit the continued prosecution of a criminal defendant, charged in a single, multiple count indictment containing greater and lesser included offenses, where that defendant persuades the trial court to honor his election to plead guilty to the lesser offenses over the state's objections.

In the case at bar the Lake County Grand Jury indicted the Defendant-Respondent in a single, multiple count indictment charging the offenses of Murder, Involuntary Manslaughter, Aggravated Robbery and Grand Theft. These charges were presented to the trial court under Case No. 79-CR-048. At his initial appearance, the Defendant-Respondent proffered Guilty pleas to Involuntary Manslaughter and Grand Theft and Not Guilty pleas to the offenses of Murder and Grand Theft. The State of Ohio asked the trial court not to accept the Defendant-Respondent's Guilty pleas in an attempt to have all issues resolved in one proceeding. After having briefs and argument submitted to the Court, the Defendant-Respondent persuaded the trial court to accept his Guilty pleas to the lesser offenses, over the State's vehement objections.

This situation is on all fours with the situation this Court faced in deciding *Jeffers v. United States*, 432 U.S. 137, 97 S. Ct. 2207, 53 L. Ed. 2d 168 (1977). In that case a Defendant had opposed the Government's attempt to consolidate separate indictments charging arguably greater and lesser included offenses. There, as in the instant case, the Defendant was responsible for thwarting the Government's attempt to have the issue of the Defendant's culpability resolved in one proceeding. The Defendant in that case was convicted of the lesser offense and moved to dismiss the indictment charging the greater

offense. That motion was denied by the District Court and the Defendant was convicted of the greater offense.

This Court did not reach the issue of whether the two offenses were the same for Double Jeopardy purposes but held that where the need for separate trials was created solely by the actions of the Defendant, he has deprived himself of any right he may have had to the Double Jeopardy protection of the Fifth Amendment. This Court concluded that the policy behind the Double Jeopardy Clause is not offended by continued prosecution in such a situation. The State of Ohio has engaged in no overreaching in this case or ever attempted to force the Defendant-Respondent to "run the judicial gauntlet" more than once. These are quite clearly the policy reasons behind the Double Jeopardy Clause.

In the case at bar, the State did not attempt to subject this Defendant-Respondent to repeated efforts to secure a conviction. The State merely attempted to present in one judicial proceeding, with one criminal case number, all the offenses for which the Lake County Grand Jury found probable cause to believe had been committed by the Defendant-Respondent. There has been no prosecutorial misconduct or overreaching in this case. To the contrary, the State objected to the trial court's acceptance of the proffered guilty pleas anticipating the Defendant-Respondent's attempt to artificially bifurcate the proceedings so as to wield the Double Jeopardy Clause to carve two prosecutions from what was in reality only one.

The Supreme Court of Ohio stated in the final paragraph of its opinion that the State cannot complain of the problem it created by bringing charges for two offenses where only one conviction was possible. Here the Court ignores the function of a Grand Jury. The Grand Jury's function is to determine whether or not there is sufficient

evidence available to the State to establish that probable cause exists to believe that a criminal offense has occurred and that particular defendant committed that offense. They are given the facts of a case through evidence available to the State. It does not hear evidence known only to the Defendant, but which may be adduced at trial nor is it to weigh the evidence by the same standard as that which a petit jury would apply in a jury trial. Obviously evidence which would support a finding of probable cause may not be sufficient to support a conviction for any offense. That being the case there is absolutely nothing wrong with a Grand Jury finding that probable cause exists under two distinct homicide statutes even though there may be but one victim involved. The question of which offenses the defendant is guilty of, beyond a reasonable doubt, is for a petit jury to decide. The State should not be precluded from a jury determination of the Defendant-Respondent's culpability where the Grand Jury and the State of Ohio sought to have that issue resolved at one time.

The Supreme Court of Ohio in the case at bar has failed to apply *Jeffers, supra,* in a case presenting essentially the same factual situation. Again, it was the action of the Defendant-Respondent in persuading the trial court to accept his Guilty pleas over the State's objections to the lesser offenses which created the multiple punishment problem. Surely the holding of *Jeffers, supra,* demands that the decision of the Ohio Supreme Court be reversed and the State of Ohio be allowed to continue its prosecution of the Defendant-Respondent for the charges of Murder and Aggravated Robbery.

III. Murder as defined in Ohio Revised Code Section 2903.02 and involuntary manslaughter as defined in Ohio Revised Code Section 2903.04 are not the same offenses for purposes of double jeopardy protections where both statutes contain different elements and conviction for either offense would require proof of facts not necessary to sustain conviction on the other.

As this Court has consistently ruled, where the same act or transaction violates two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, for double jeopardy purposes, is whether each statute requires proof of an additional fact which the other does not. *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932). Under Ohio statutes both Murder and Involuntary Manslaughter share the common element of causing the death of another. However, the Murder statute requires proof that the offender acted with a purposeful intention to cause the death of another. The Involuntary Manslaughter statute, under the division with which the Defendant-Respondent was charged requires proof that the death of another was caused as a proximate result of the defendant's commission of a misdemeanor offense. Analysis of these separate and distinct offenses shows that each would require proof of facts not necessary to prove the other offense. Obviously, evidence presented to show that the death of a victim was caused as the proximate result of the defendant's commismission of a misdemeanor would not be sufficient alone to show that the defendant acted with a purposeful intention to cause the death of that victim.

The reverse of that situation is also true. Proof that the defendant purposely caused the death of another would not in and of itself show that the defendant had com-

mitted any misdemeanor, which may have caused the victim's death. To sustain a conviction for Involuntary Manslaughter there is no requirement that the State show that the defendant had any intention whatsoever to cause the death of the victim. This is not the case in order for the State to sustain a conviction for Murder.

Since the elements of Murder require proof of facts and an element different from the proof and elements required to sustain a conviction for Involuntary Manslaughter the two offenses are not the same for purposes of the Double Jeopardy Clause of the United States Constitution as defined under the *Blockburger, supra,* decision.

CONCLUSION

In the case at bar the Defendant-Respondent has persuaded the Ohio Courts to apply the Double Jeopardy Clause of the Fifth Amendment in a manner wholly inconsistent with the holdings of this Court and the time-honored policy factors behind the Double Jeopardy protections. This ruling also contravenes the rights of the State of Ohio as a litigant in this matter. Surely the people of Ohio have the right to have issues of criminal culpability resolved in one proceeding and to extract full punishment for criminal conduct. The State seeks nothing more or less in this matter and has engaged in no misconduct toward the Defendant-Respondent. The Double Jeopardy protection is just that; a protection. It is not an offensive weapon.

The ruling of the Ohio Supreme Court severely hampers the function of Ohio Grand Juries. It has said that you may not issue multiple count indictments containing lesser and greater included offenses, even though you may

find the requisite probable cause for each, without running the risk that those crimes may not be fully prosecuted and punished. It has said further that Grand Juries must now, though laymen, possess the legal acumen of skilled attorneys when handing down indictments where criminal acts violate more than one statute, if crimes are to be fully punished. This undue fettering of the Grand Jury process is without justification in balancing the interests of the people of Ohio and the rights of any particular defendant.

For the foregoing reasons, the decision of the Supreme Court of Ohio must be reversed.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided August 31, 1983)

No. 82-657

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellant,

vs.

KENNETH M. JOHNSON,
Appellee.

6 Ohio St. 3d 420

Criminal Law: aggravated robbery and theft are allied offenses of similar import; murder and involuntary manslaughter distinguished, how; double jeopardy prohibits conviction of both murder and involuntary manslaughter, when.

1. Aggravated robbery, as defined by R. C. 2911.01, is an "allied offense of similar import" to theft, as defined by R. C. 2913.02. (R. C. 2941.25[A], applied.)

2. The offenses of murder, R. C. 2903.02, and involuntary manslaughter, R. C. 2903.04, share the common element of causing the death of another and are distinguishable only by the offender's mental state. The prohibition against double jeopardy requires that in any one killing, the offender may be convicted of one or the other of the offenses but not both.

APPEAL From the Court of Appeals for Lake County.

On February 13, 1979, appellee, Kenneth M. Johnson, was indicted by the Lake County Grand Jury for one count each of the offenses of murder, R. C. 2903.02(A), involuntary manslaughter, R. C. 2903.04(B), aggravated robbery, R. C. 2911.01(A)(1), and grand theft, R. C. 2913.02(A)(1). All four charges stemmed from an incident occurring on January 25, 1979, in which Thomas D. Hill was shot to death and several items of personal property were taken from his apartment.

At his arraignment conducted on October 9, 1980, appellee attempted to enter a plea of guilty as to the charges of involuntary manslaughter and theft and not guilty as to the remaining charges. After a series of hearings and, over the objections of the state, the trial court accepted this plea on November 26, 1980. The court thereafter sentenced appellee to serve three to ten years on the involuntary manslaughter count and two to five years on the theft count.

Subsequently, appellee filed a motion to dismiss the charges remaining against him on the basis that his constitutional protection against being placed twice in jeopardy for the same offense would be violated if he were to be tried on the counts of murder and aggravated robbery. Upon consideration, the trial court found this argument to be well-taken and granted the motion to dismiss.

The court of appeals affirmed and the cause is now before this court upon the allowance of a motion for leave to appeal.

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[421] J. P. Celebrezze, J. The Double Jeopardy Clause is contained in the Fifth Amendment to the United States Constitution which provides, in part, "* * * nor shall any person be subject for the same offense to be twice put in

jeopardy of life or limb." This prohibition has been held to be applicable to the states by operation of the Fourteenth Amendment. *Benton v. Maryland* (1969), 395 U. S. 784, 794. Moreover, the Ohio Constitution contains a similar protection in Section 10, Article I which states, "* * * [n]o person shall be twice put in jeopardy for the same offense."

It is established that there are three protections offered by the Double Jeopardy Clause to the criminal defendant: (1) protection against a second prosecution for the same offense after acquittal, (2) protection against a second prosecution for the same offense after conviction, and (3) protection against multiple punishments for the same offense. *North Carolina v. Pearce* (1969), 395 U. S. 711, 717.

It is the state's position that the second of those protections was improperly invoked and applied in this case. In support of this position, the state advances a two-pronged argument. First, it maintains that the offenses of murder and involuntary manslaughter and the offenses of aggravated robbery and theft are not the same for double jeopardy purposes. Second, citing the cases of *Jeffers v. United States* (1977), 432 U. S. 137, and *United States v. Goldman* (C.A. 3, 1965), 352 F. 2d 263, it asserts that the appellee was not subjected to multiple prosecutions in that he was properly charged with all four offenses in a single indictment and that he chose to artificially bifurcate the proceedings by pleading guilty to some of the offenses and not guilty to the others. In summary, the state asserts that a criminal defendant charged with multiple crimes should not be permitted to manipulate the timing of the proceedings in such a manner as to avoid prosecution for the more serious charges by pleading guilty to the lesser offenses and then claiming a double jeopardy bar as to the others.

The state's position rests upon the argument that the essential issue in this case is one of timing. Accordingly, it maintains that were it not for the trial court's erroneous acceptance of a partial guilty plea over prosecutorial objections, the case would have proceeded to trial and the appellee could have been convicted of all four counts of the indictment.

Upon careful consideration of the record below as well as the applicable statutory and case law, we find this position to be untenable. We agree with the appellant that this case does not involve successive prosecutions such as to warrant the application of the collateral estoppel principles set forth in *Ashe v. Swenson* (1970), 397 U. S. 436, and its progeny. Rather, this case concerns the third double jeopardy protection prohibiting multiple punishments for the same offense. In reviewing and applying this protection, it is our conclusion that the appellee could not have been convicted of all the charges against him regardless of the timing of the trial court's acceptance of his pleas.

Where an accused is charged with more than one statutory violation and [422] the double jeopardy prohibition against multiple punishments for the same offense is invoked, the standard test to be applied in determining whether the offenses are sufficiently distinguishable is the one enunciated in *Blockburger v. United States* (1932), 284 U. S. 299, 304:

> "• • • The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. • • •"

This test stresses the commonality of the elements of the offenses charged and generally forbids cumulative punishments for both a greater and a lesser included offense. *Brown v. Ohio* (1977), 432 U. S. 161, 164-166. It is noteworthy, however, that the two offenses need not be identical in constituent elements or in actual proof in order to be the same for double jeopardy purposes. *Id.* at 164.

The General Assembly has further effectuated the principles contained in the Double Jeopardy Clause by means of R. C. 2941.25, the multiple count statute. *State v. Thomas* (1980), 61 Ohio St. 2d 254, 259-260 [15 O.O. 3d 262]. This statute provides:

> "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

As in *Blockburger*, this statute involves comparing the elements of the various statutory offenses with which the defendant is charged. Allied offenses of similar import are those offenses which have elements corresponding to such a degree that the commission of one offense will result in the commission of the other. *State v. Logan* (1979), 60 Ohio St. 2d 126, 128 [14 O.O. 3d 373]. Where the offenses are allied, the defendant may not be convicted of them all

unless they were committed separately or with a separate animus as to each. R. C. 2941.25(B).

In this case, the appellee was charged with both aggravated robbery and theft. "Aggravated robbery" was defined in R. C. 2911.01 as follows:[1]

> "(A) No person, in attempting or committing a theft offense as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:
>
> "(1) Have a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code on or about his person or under his control;
>
> **[423]** "(2) Inflict, or attempt to inflict serious physical harm on another.
>
> "(B) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree."

"Theft" was defined in R. C. 2913.02:

> "(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either:
>
> "(1) Without the consent of the owner or person authorized to give consent;
>
> "(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;
>
> "(3) By deception;
>
> "(4) By threat.

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1. R. C. 2911.01, as well as R. C. 2911.02, 2913.02 and 2903.04, *infra*, were amended effective January 5, 1983.

"(B) Whoever violates this section is guilty of theft. * * *"

This court has previously held that where theft does not require the proof of any element not required to be proved for the offense of robbery as defined in R. C. 2911.02,[2] they are the same offense for double jeopardy purposes. *State v. Harris* (1979), 58 Ohio St. 2d 257 [12 O.O. 3d 265]. We believe that the same reasoning applies in the case of theft and aggravated robbery.

The Committee Comment to R. C. 2911.01 indicates that theft is the basic element of robbery with the principle difference between the offenses being that robbery involves an element of actual or threatened personal harm to the victim. The seriousness of the robbery is determined by the degree of actual or potential harm with aggravated robbery involving the highest degree. The element of potential harm to the victim is present in this case due to the appellee's use of a deadly weapon. Therefore, it is apparent that in proving the offense of aggravated robbery the underlying theft offense is also demonstrated. Accordingly, the court below did not err in finding that the prohibition against multiple punishments for the same offense forbade appellee's conviction for both offenses.

Appellee was also charged with both murder and involuntary manslaughter. The former offense is defined in R. C. 2903.02:

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2. R. C. 2911.02 provided:

"(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall use or threaten the immediate use of force against another.

"(B) Whoever violates this section is guilty of robbery, a felony of the second degree."

"(A) No person shall purposely cause the death of another.

"(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code."

Involuntary manslaughter was defined in R. C. 2903.04:

"(A) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony.

"(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor.

"(C) Whoever violates this section is guilty of involuntary man- **[424]** slaughter. Violation of division (A) of this section is a felony of the first degree. Violation of division (B) of this section is a felony of the third degree.

Clearly, the common element shared by these two offenses is the causing of the death of another with the only distinguishing factor being the mental state involved in that act. Murder is the more serious offense in that it involves the purposeful killing of another. Involuntary manslaughter involves a lesser mental state as it is a killing which proximately results from the defendant's committing or attempting to commit another offense.[3] It is manifestly obvious that these two states are mutually exclusive and that in any given killing the offender may be possessed of only one. Under the *Blockburger* analysis,

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3. Where an offender commits a purposeful murder while committing or attempting to commit a felony, he is properly charged with aggravated murder under R. C. 2903.01.

the possibility of proving a fact for one offense which is not required under the other is excluded. As such, in any case where there is but on victim, the accused may be found guilty of either murder or involuntary manslaughter but certainly not both.

In this case, appellee entered a plea of guilty to the charge of involuntary manslaughter and not guilty to murder. After briefly hearing the facts underlying the charges, the trial court accepted this plea and thereafter properly dismissed the murder charge on double jeopardy principles. The state cannot now be heard to complain about this result as it created the problem by charging the accused with double offenses where only one conviction was possible.

Based upon the foregoing analysis, the judgment of the court of appeals is affirmed.

Judgment affirmed.

CELEBREZZE, C.J., KEEFE, SWEENEY, HOLMES and C. BROWN, JJ., concur.

LOCHER, J., dissents.

KEEFE, J., of the First Appellate District, sitting for W. BROWN, J.

LOCHER, J., dissenting. As I am convinced that the majority has misapplied the Double Jeopardy Clause in the present action, I must respectfully dissent.

It is beyond dispute that a defendant found guilty of a lesser included offense but acquitted on the greater charge may not, consonant with the mandates of the double jeopardy prohibition, be retried on the latter. The same result does not follow, however, where, as in the case at bar, de-

fendant pleaded to the lesser offense and the greater was consequently dismissed [425] without trial. To date, all federal circuit courts of appeals that have addressed the legal issue present in such a scenario have held that a party may be retried as to the greater offense when the original judgment has been set aside. *Hawk v. Berkemer* (C.A. 6, 1979), 610 F.2d 445; *Lowery v. Estelle* (C.A. 5, 1983), 696 F. 2d 333; *United States v. Barker,* (C.A. 9, 1982), 681 F. 2d 589; *Klobuchir v. Commonwealth of Pennsylvania* (C.A. 3, 1981), 639 F. 2d 966; *United States v. Myles* (D.D.C. 1977), 430 F.Supp. 98, affirmed without opinion (C.A.D.C. 1978), 569 F. 2d 161; *United States v. Williams* (C.A. 8, 1976), 534 F. 2d 119; *United States v. Johnson* (C.A. 4, 1976), 537 F. 2d 1170; *United States v. Anderson* (C.A. 7, 1975), 514 F. 2d 583; *United States, ex rel. Williams, v. McMann* (C.A. 2, 1970), 436 F. 2d 103; *Ward v. Page* (C.A. 10, 1970), 424 F. 2d 491.

In reaching their decisions, these federal appellate courts have essentially followed a two-step process of analysis. First, they have held that in the context of multiple trials for the same offense, the principle of double jeopardy is not implicated unless an attempt has been made to retry a party on a charge for which he has already been acquitted. *Lowery v. Estelle, supra,* at 340; *Hawk v. Berkemer, supra,* at 447; *Ward v. Page, supra,* at 493. Secondly, relying upon the United States Supreme Court's decision in *United States v. Scott* (1978), 437 U. S. 82, the courts have ruled that where a charge on an offense has been dismissed as a result of a plea to a lesser included offense, defendant has *not* been acquitted of the greater. *Klobuchir v. Commonwealth of Pennsylvania, supra,* at 969; *United States v. Barker, supra,* at 591. As the court stated in *Scott, supra* at 97, quoting *United States v. Martin Linen* (1977), 430 U. S. 564, 571:

> "* * * [A] defendant is acquitted only when 'the ruling of a judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'"

The province of the jurisprudential philosophy expressed in the aforementioned decisions is manifest, given the underlying policy of the double jeopardy guarantee. Clearly, the primary objective of this constitutional right is to proscribe the physical, emotional and financial "harassment" of parties through repeated prosecutions for the same criminal offense. *Green v. United States* (1957), 355 U. S. 184; *State v. Thomas* (1980), 61 Ohio St. 2d 254. The policy is not violated where the defendant has not truly "run the judicial gauntlet" and, indeed, has voluntarily chosen, by pleading gulity, to end all inquiry into his guilt and where no prosecutorial misconduct, necessitating the retrial, is either present or alleged.

By improperly accepting, over the prosecution's objections, appellee's guilty plea to lesser charges, based on its own misunderstanding of the effect such pleas would have on subsequent jury instructions,[4] the trial court clearly **[426]** abused the discretion granted it under Crim. R. 11(C)(2).[5] Therefore, appellant is entitled to vacation of

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4. The trial court wrongly concluded that appellee's guilty plea to the lesser offense operated to activate his double jeopardy protections and would have precluded the rendition of jury instructions on such offenses were the case to have proceeded to trial. By pleading guilty to the offenses, however, appellee effectively waived his right to a charge on such offenses as his plea represented an admission of culpability. See *Forthoffer v. Swope* (C.A. 9, 1939), 103 F. 2d 707. Thus, this court's holding in *State v. Loudermill* (1965), 2 Ohio St. 2d 79 [31 O.O. 2d 60], was inapposite to the trial court's decision herein.

5. Crim R. 11(C)(2) provides, in pertinent part: "In felony cases the court may refuse to accept a plea of guilty * * *."

the earlier judgment and trial of appellee on the murder charge. Such a result would be consistent with current constitutional standards and would in no way contravene the policy underlying the Double Jeopardy Clause. The prosecution acted in good faith by bringing all possible charges against appellee in a single proceeding and, but for the court's error, all relevant issues of criminal culpability would have been resolved therein.

The majority also errs in the case at bar when it writes that the United States Supreme Court's pronouncement in *Blockburger v. United States* (1932), 284 U. S. 299, establishes the standard for determining whether offenses are "sufficiently distinguishable" to avoid the double jeopardy prohibition against multiple punishments for the same offense. This court explicitly repudiated such an argument in *State v. Moss* (1982), 69 Ohio St. 2d 515 [23 O.O. 3d 447], where we held that the *Blockburger* test is merely a rule of statutory construction and is not to be used alone to divine legislative intent where other tests may be utilized to discern such intent. The majority simply ignores restrictions so recently placed on the applicability of *Blockburger* to double jeopardy questions involving alleged multiple punishments.

Thus, on the basis of the aforementioned reasons, I dissent from today's opinion which affirms the erroneous ruling of the court of appeals.

ORDER OF THE SUPREME COURT OF OHIO

(Dated August 31, 1983)

No. 82-657

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellant,

vs.

KENNETH M. JOHNSON,
Appellee.

MANDATE

To the Honorable Common Pleas Court Within and for the County of Lake, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.

OPINION OF THE COURT OF APPEALS OF LAKE COUNTY, OHIO

(Filed April 1, 1982)

Case No. 8-221

COURT OF APPEALS OF OHIO
ELEVENTH DISTRICT
COUNTY OF LAKE

STATE OF OHIO,
Plaintiff-Appellant,

VS.

KENNETH M. JOHNSON,
Defendant-Appellee.

OPINION

DAHLING, J.,

This is an appeal from a judgment of the Court of Common Pleas, Lake County, wherein the court dismissed Counts of Murder and Aggravated Robbery. The State of Ohio has appealed.

The reasoning of Judge Jackson in his opinion and judgment concisely states the proposition of law at issue. Judge Jackson stated:

> "Defendant was initially charged in a four count indictment for the offenses of murder, involuntary manslaughter, aggravated robbery and grand theft. On December 10, 1981, the defendant entered pleas of guilty to the lesser offenses of involuntary manslaughter and grand theft.

"The issues presented are twofold. First, whether involuntary manslaughter, in the case at bar, is a lesser included offense of murder. Second, whether grand theft, given the facts at hand, is a lesser included offense of aggravated robbery.

If the answer to either of these questions is yes, then the attachment of jeopardy, by this Court's acceptance of the aforementioned guilty pleas to the lesser offense, would prevent further prosecution and/or conviction on the remaining greater offense. *Ohio Revised Code Ann.* Sec. 2943.09 (Page 1975).

An offense constitutes a lesser included offense when the elements necessary to prove the lesser offense are contained in the proof of the greater offense. As the United States Supreme Court in *Blockburger v. United States*, 284 U.S. 299, 304 (1931), stated,

> [t]he applicable rule is that where the same act . . . constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether, each provision requires proof of an additional fact that the other does not.

See also State v. Harris, 58 Ohio St. 2d 257, 389 N.E. 2d 1121 (1979).

An analysis of the various elements of murder and involuntary manslaughter establishes, under the particular facts of this case, that involuntary manslaughter involves the proof of no fact not required to substantiate the crime of murder.

Therefore, the Court finds on the facts of this case that the State, in substantiating the events that culminated in the death of the instant victim, will

invariably encompass the element of proximate cause while attempting or actually committing a misdemeanor. Hence, as applied, involuntary manslaughter would prevail as a lesser included offense of murder.

In addition, the Court is totally cognizant of the fact that should this case proceed to trial on the remaining charges and the factual evidence presented is such that this Court would be compelled to charge the jury on the lesser offenses of involuntary manslaughter and grand theft, at that point the defendant's constitutional rights would have been surely violated. *See State v. Loudermill*, 2 Ohio St. 2d 79, 206 N.E. 2d 198 (1965).

For at that juncture of the proceedings, defendant would have been placed in jeopardy for the second time for the exact same offense, rendering totally meaningless the Double Jeopardy Clause embodied in the Fifth Amendment of the United States Constitution.

Addressing the issue of grand theft being a lesser included offense of aggravated robbery, the Court again finds that the charge of grand theft requires proof of no fact not required as an element of aggravated robbery in this case.

By statute, aggravated robbery is defined as a theft, either attempted or actual, committed while possessing a deadly or dangerous weapon. *Ohio Revised Code Ann.* Sec. 2911.01 (Page 1975). The foundation of this offense is a theft. Consequently, it is essential to the proof of aggravated robbery that the underlying theft be established.

The State argues that since the crime of grand theft requires proof of value in excess of $150, which

is not required to prove aggravated robbery, that the test of a lesser included offense has not been satisfied. This Court does not agree.

The factors differentiating grand theft from petty theft pertain to the degree of punishment and not to the establishment of the crime itself. Second, the rationale applied by the Ohio Supreme Court in *State v. Harris, supra,* butresses this position. In *Harris, supra,* grand theft was held to be a lesser included offense of robbery, even though proof of defendant's prior conviction for armed robbery, the factor which elevated the theft to grand theft, is not an element of the crime of robbery. Similarly, in the case at bar, the proof of value does not *ipso facto* place these two crimes outside the scope of the *Blockburger* rule.

Since involuntary manslaughter as it pertains to murder and grand theft as it pertains to aggravated robbery do not require proof of any element not required to be proven in the greater offense, this Court finds that both are the same offense for double jeopardy purposes. In so concluding, the double jeopardy doctrine would prohibit multiple punishments for a singular offense. *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969)."

The State has presented the following Assignments of Error for review:

I. THE LOWER COURT ERRED IN DISMISSING THE COUNTS OF THE INDICTMENT CHARGING MURDER AND AGGRAVATED ROBBERY FOLLOWING APPELLEE'S GUILTY PLEA TO THE OFFENSES OF INVOLUNTARY MANSLAUGHTER AND GRAND THEFT BECAUSE THE OFFENSES OF INVOLUNTARY MANSLAUGHTER AND

GRAND THEFT ARE NOT THE SAME OFFENSES AS MURDER AND AGGRAVATED ROBBERY FOR PURPOSES OF THE DOUBLE JEOPARDY CLAUSE.

II. WHERE, IN ONE PROCEEDING, AN INDICTMENT CHARGES MURDER, INVOLUNTARY MANSLAUGHTER, AGGRAVATED ROBBERY AND GRAND THEFT, AND A DEFENDANT PLEADS GUILTY TO INVOLUNTARY MANSLAUGHTER AND GRAND THEFT, HE IS NOT SUBJECTED TO MULTIPLE PROSECUTIONS AS PROHIBITED BY THE DOUBLE JEOPARDY CLAUSE, WHERE THE PROCEEDING CONTINUES THROUGH TRIAL ON THE REMAINING COUNTS.

These Assignments of Error are without merit.

Not to be unnecessarily repetitious, but the well reasoned opinion of Judge Jackson adequately covers the issues raised by appellant. We agree that involuntary manslaughter is a lesser included offense of murder and grand theft is a lesser included offense of robbery. The judgment is accordingly affirmed.

Judgment affirmed.

/s/ ALFRED E. DAHLING
Judge

HOFSTETTER, *P.J.*,
COOK, *J.*, Concur

JUDGMENT ENTRY OF THE COURT OF APPEALS OF LAKE COUNTY, OHIO

(Filed April 1, 1982)

Case No. 8-221

IN THE COURT OF APPEALS
ELEVENTH DISTRICT
COUNTY OF LAKE

STATE OF OHIO,
Appellant,

vs

KENNETH M. JOHNSON,
Appellee.

JUDGMENT ENTRY

This cause came on to be heard upon the Record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court finds no error prejudicial to the appellant and, therefore, the judgment of the Trial Court is affirmed. Each Assignment of Error was reviewed by the Court and disposed of as set forth in this Court's Opinion, which is incorporated herein by reference.

It is ordered that the costs shall be taxed against the appellant.

This Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ ALFRED E. DAHLING
Judge for the Court

JUDGMENT ENTRY AND OPINION OF THE COURT OF COMMON PLEAS

(Filed March 31, 1981)

Case No. 79 CR 048

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

STATE OF OHIO,
Plaintiff,

vs.

KENNETH M. JOHNSON;
Defendant.

JUDGMENT ENTRY AND OPINION

This cause is before the Court on defendant's Motion to Dismiss, as supported by his Memorandum in Support of the motion and Reply Memorandum. The State of Ohio has responded with a Brief in Opposition to the Motion to Dismiss and a Reply Memorandum. The Court, upon careful consideration, finds defendant's position with regard to the plea of double jeopardy well taken.

Defendant was initially charged in a four count indictment for the offenses of murder, involuntary manslaughter, aggravated robbery and grand theft. On December 10, 1981, the defendant entered pleas of guilty to the lesser offenses of involuntary manslaughter and grand theft.

The issues presented are twofold. First, whether involuntary manslaughter, in the case at bar, is a lesser in-

cluded offense of murder. Second, whether grand theft, given the facts at hand, is a lesser included offense of aggravated robbery.

If the answer to either of these questions is yes, then the attachment of jeopardy, by this Court's acceptance of the aforementioned guilty pleas to the lesser offense, would prevent further prosecution and/or conviction on the remaining greater offense. *Ohio Revised Code Ann.* §2943.09 (Page 1975).

An offense constitutes a lesser included offense when the elements necessary to prove the lesser offense are contained in the proof of the greater offense. As the United States Supreme Court in *Blockburger v. United States,* 284 U.S. 299, 304 (1931), stated,

> [t]he applicable rule is that where the same act . . . constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether, each provision requires proof of an additional fact that the other does not.

See also State v. Harris, 58 Ohio St. 2d 257, 389 N.E. 2d 1121 (1979).

An analysis of the various elements of murder and involuntary manslaughter establishes, under the particular facts of this case, that involuntary manslaughter involves the proof of no fact not required to substantiate the crime of murder.

Therefore, the Court finds on the facts of this case that the State, in substantiating the events that culminated in the death of the instant victim, will invariably encompass the element of proximate cause while attempting or actually committing a misdemeanor. Hence, as applied,

involuntary manslaughter would prevail as a lesser included offense of murder.

In addition, the Court is totally cognizant of the fact that should this case proceed to trial on the remaining charges and the factual evidence presented is such that this Court would be compelled to charge the jury on the lesser offenses of involuntary manslaughter and grand theft, at that point the defendant's constitutional rights would have been surely violated. *See State v. Loudermill,* 2 Ohio St. 2d 79, 206 N.E. 2d 198 (1965).

For at that juncture of the proceedings, defendant would have been placed in jeopardy for the second time for the exact same offense, rendering totally meaningless the Double Jeopardy Clause embodied in the Fifth Amendment of the United States Constitution.

Addressing the issue of grand theft being a lesser included offense of aggravated robbery, the Court again finds that the charge of grand theft requires proof of no fact not required as an element of aggravated robbery in this case.

By statute, aggravated robbery is defined as a theft, either attempted or actual, committed while possessing a deadly or dangerous weapon. *Ohio Revised Code Ann.* §2911.01 (Page 1975). The foundation of this offense is a theft. Consequently, it is essential to the proof of aggravated robbery that the underlying theft be established.

The State argues that since the crime of grand theft requires proof of value in excess of $150, which is not required to prove aggravated robbery, that the test of a lesser included offense has not been satisfied. This Court does not agree.

The factors differentiating grand theft from petty theft pertain to the degree of punishment and not to the establishment of the crime itself. Second, the rationale applied by the Ohio Supreme Court in *State v. Harris, supra,* buttresses this position. In *Harris, supra,* grand theft was held to be a lesser included offense of robbery, even though proof of defendant's prior conviction for armed robbery, the factor which elevated the theft to grand theft, is not an element of the crime of robbery. Similarly, in the case at bar, the proof of value does not *ipso facto* place these two crimes outside the scope of the *Blockburger* rule.

Since involuntary manslaughter as it pertains to murder and grand theft as it pertains to aggravated robbery do not require proof of any element not required to be proven in the greater offense, this Court finds that both are the same offense for double jeopardy purposes. In so concluding, the double jeopardy doctrine would prohibit multiple punishments for a singular offense. *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969).

Therefore, defendant's Motion to Dismiss Count One and Count Three of the indictment is forthwith granted.

Exceptions are noted for the State of Ohio.

IT IS SO ORDERED.

/s/ JAMES W. JACKSON
Judge of the Court of Common Pleas

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

(Dated August 31, 1983)

No. 82-657

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellant,

vs.

KENNETH M. JOHNSON,
Appellee.

APPEAL FROM THE COURT OF APPEALS
FOR LAKE COUNTY

This cause, here on appeal from the Court of Appeals for Lake County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lake County for entry.

OHIO REVISED CODE

§2903.02 Murder

(A) No person shall purposely cause the death of another.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§2903.04 Involuntary manslaughter.

. . .

(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor.

(C) Whoever violates this section is guilty of involuntary manslaughter. Violation of division (A) of this section is a felony of the first degree. Violation of division (B) of this section is a felony of the third degree.

§2911.01 Aggravated robbery.

(A) No person, in attempting or committing a theft offense as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

(1) Have a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code on or about his person or under his control;

(B) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

§2913.02 Theft.

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception;

(4) By threat.

(B) Whoever violates this section is guilty of theft. If the value of the property or services stolen is less than one hundred fifty dollars, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is one hundred fifty dollars or more, or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, or if the offender has previously been convicted of a theft offense, a violation of this section is grand theft, a felony of the fourth degree. If the property stolen is a motor vehicle, as defined in section 4501.01 of the Revised Code, a violation of this section is grand theft of a motor vehicle, a felony of the third degree.

§2941.25 Multiple counts.

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

• • •

§2929.41 Multiple sentences.

(A) Except as provided in division (B) of this section, a sentence of imprisonment shall be served concurrently with any other sentence of imprisonment imposed by a court of this state, another state, or of the United States. In any case, a sentence of imprisonment for misdemeanor shall be served concurrently with a sentence of imprisonment for felony served in a state or federal penal or reformatory institution.

(B) A sentence of imprisonment shall be served consecutively to any other sentence of imprisonment, in the following cases:

(1) When the trial court specifies that it is to be served consecutively;

. . .

§2953.21 Petition to vacate or set aside sentence.

(A) Any person convicted of a criminal offense or adjudged delinquent claiming that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, may file a verified petition at any time in the court which imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file such supporting affidavit and other documentary evidence as will support his claim for relief.

. . .

(G) If the court finds grounds for granting relief, it shall, by its judgment, vacate and set aside the judgment, and shall, in the case of a prisoner in custody, discharge

or resentence him or grant a new trial as may appear appropriate. The court may also make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody, and bail.

. . .

[§2967.19.1] §2967.191 Reduction of minimum and maximum sentence.

The adult parole authority shall reduce the minimum and maximum sentence of a prisoner by the total number of days that the prisoner was confined for any reason arising out of the offense for which he was convicted and sentenced, . . .

THE CONSTITUTION OF THE UNITED STATES

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14; Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.